

The Court finds that the evidence adduced so far fails to establish that the Claimant suffered any battery other than that her breasts were briefly fondled. By the Claimant's own admission this contact did not cause her any physical pain. The minimal standard set out in Griswold for the determination of whether there has been "any lesion or change in the physical structure of the body, causing damage or harm thereto" has not been met. It is unfortunate that by law her request for

benefits must be denied, even though she has a psychological injury which arose out of and in the course of her employment.¹

Claimant contends Judge Benedict erred. Claimant argues she was sexually assaulted at knife point and robbed because of her position as manager of respondent's restaurant. In addition, claimant contends the assault constituted a personal injury that harmed her both physically and mentally. Accordingly, claimant asserts her injuries are compensable under the Workers Compensation Act.

Conversely, respondent and its insurance fund argue claimant should not receive psychological treatment at their expense because claimant did not suffer any physical injury, which they contend is required to support a claim for psychological trauma. Moreover, they contend claimant has failed to prove that the robber groped claimant's genitals and rectum or penetrated any body cavity as alleged. In short, respondent and its insurance fund request the Board to affirm the February 12, 2007, Order as claimant failed to prove she sustained any personal injury that arose out of and in the course of her employment with respondent.

The only issue on this appeal is whether claimant has sustained personal injury by accident arising out of and in the course of her employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes claimant sustained personal injury by accident arising out of and in the course of her employment with respondent. Accordingly, the February 12, 2007, Order is reversed.

There is no question that claimant and a co-worker were robbed at knife point on October 24, 2006, at work in a sandwich shop owned by respondent. There is also no question that the robber also fondled claimant's breasts. At this juncture, respondent and its insurance fund are not challenging the Judge's finding that claimant has sustained psychological injury by reason of the robbery. Rather, the primary challenge is whether the robber also groped claimant's genitalia and rectum and, if so, whether claimant sustained any physical injury that would entitle claimant to receive psychological treatment under the Workers Compensation Act.

Claimant testified the robber may have scratched her vagina as she later experienced a burning sensation when she urinated and that he may have caused other

¹ ALJ Order (Feb. 12, 2007).

injury as she temporarily had to strain to have a bowel movement. That testimony is credible. Claimant's reluctance to discuss the extent of the groping with either the police or respondent's management is understandable.

The undersigned has watched the videotape that was presented to the Judge. That tape, however, does not contain the footage of the robbery as it appears to end before the robbery occurred.

The Workers Compensation Act defines "personal injury" as follows:

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.²

Likewise, the Act defines "accident" as follows:

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. . . .³

There is no predetermined amount of force or trauma that is required to constitute an accident or an injury under the Kansas Workers Compensation Act. Furthermore, there is no requirement that an injury be permanent before an injured worker is eligible to receive preliminary hearing benefits.⁴

In summary, claimant has proven she suffered personal injury by accident arising out of and in the course of her employment with respondent. Consequently, she is entitled to receive the psychological treatment that she now requests.

² K.S.A. 2006 Supp. 44-508(e).

³ K.S.A. 2006 Supp. 44-508(d).

⁴ *Griswold v. State of Kansas*, No. 1,029,801, 2006 WL 3298959 (Kan. WCAB Oct. 31, 2006).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the February 12, 2007, Order is reversed and this claim is remanded to the Judge to require respondent and its insurance fund to provide claimant appropriate psychological treatment and any appropriate temporary total disability benefits.

IT IS SO ORDERED.

Dated this ____ day of May, 2007.

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Fund
Bryce D. Benedict, Administrative Law Judge

⁵ K.S.A. 44-534a.